

A Discussion of: Jurisprudence Today: Naturalism vs. Positivism

RUTKOWSKI: In our private conversations after Professor Donoso's lecture this morning, Professor Strauss indicated that he liked very much Professor Donoso's listing, in a "rainbow fashion," the various schools of jurisprudence. I thought this was a very apt phrase to describe the kind of lucidity we saw in Dr. Donoso's paper.

Do you object, Professor Strauss, to my reporting your word, "rainbow?"

STRAUSS: I do not. Indeed, it is not my word. I just took it up from the street, not to say from the gutter. But it has a certain aptness of which I have become aware just now. It is the insensible shifting from one side to another which was largely illustrated by this morning's paper. Now if I may make another irrelevant remark before I come to my main point, I would like to say a word about the term, "orthodoxy," which is somehow used or implied when people speak of right and left. It can be understood in different ways. Either the orthodoxy is determined by intrinsic "rightness" — this is what Dr. Donoso did — or you can define orthodoxy by the majority vote, which could seem to be more democratic. From this point of view, the behavioralistic school would clearly be the orthodoxy of our day, and the natural law people the extreme left. The distinctions which you made were perfectly clear and entirely defensible on the basis of the evidence. But I would like to reformulate your statement. This does not bespeak any difference between Dr. Donoso and myself.

I would put at the left, the extreme left, what I would loosely call relativism. This includes legal positivism and other positivisms, as well as such a position as that of Lon Fuller; in a word, all those who do not admit any standards higher than positive standards. The

highest positive standard does not have to be the positive law; only very narrow-minded people assert that. If you admit as the highest standards, say, the principles of the Western tradition, or something like that, that is still a positive standard. It is surely preferable to ordinary legal positivism, but it is, I think, subject to the same charge — that it is a relativistic position. Because if you appeal to Western ideas as the highest principles, then you do nothing different from what a central African does who appeals to the ideas or values of his tribe.

Now then, if we turn to the right from here, I would say we come next to pragmatism. Pragmatism does have an ethics which it claims in effect is universally valid. But as universally valid it is formal; it defines the good in terms of a certain relation between custom and impulse; the content comes from the infinitely variable customs and impulses.

If we go one more step in the right direction, to the right, then we come to something we may call rationalism or idealism. According to this view, there are universally valid standards of some substance, but they do not have the character of natural ends; they have the character of ideals. They are ideas of reason. In other words, here is the true home of the distinction between the “is” and the “ought.” All those who speak of values in the sense of *the* values (the eternal values) or *the* ideals belong to this group.

Finally, the fourth group consists of those who deny the fundamental distinction between “is” and “ought” by speaking of the natural law proper. In other words, the people whom I loosely called rationalists or idealists do not admit of natural inclinations, whereas the concept of natural ends and natural inclinations is essential to the fourth group.

This is the way in which I see the rainbow discussed so competently by Dr. Donoso. I disregarded, of course, the more subtle differences within present-day American jurisprudence. But I think in substance we agree, do we not?

DONOSO: Yes.

RUTKOWSKI: I'd like to see if I can point up a question related to what has just been said. Professor Kirk has emphasized in his writings the notion of inherited legacy, of culture and tradition in a strong Burkean sense. I wonder, Professor Kirk, if you can link what you have been writing about to what Professor Strauss has just emphasized in Mr. Donoso's evaluation of positivism and jurisprudence.

KIRK: Yes, I do see a close connection there. I was especially interested in Mr. Donoso's account of legal idealism, with reference to Harold Lasswell, and a phrase that we encounter in Lasswell and all kinds of other people nowadays: human dignity and the protection

of human dignity. This has always puzzled me in connection with the legal idealists because it seems so empty in their context. It seems to have no more meaning than the meaning which is contained in Mark Twain's ironic phrase: "One man is as good as another, or perhaps a little bit better" — a vague humanitarianism without any content or reference. I think there is an understanding of human dignity in the traditional jurisprudence, and this is the model and source of human dignity which provides the law with its majesty. But if we break with the great traditions of jurisprudence and with its natural law sources, then the standard of human dignity, as in so much else, is left with only the empty phrase. This phrase, human dignity, is for the most part derived from Pico della Mirandola's celebrated oration on this topic. Mirandola was appealing to the great traditions of philosophy and jurisprudence. He derived human dignity from a source more than human. There is implicit in his argument the existence of transcendent norms and the assumption that human nature is a constant, and that human nature is dignified because it is something more than animal nature. In Mirandola's concept and elsewhere, one assumes that there are models for human nature. For the classical philosopher, Socrates was such a model of what a man should be. For the Christian, Christ is the model for humanity and an example of how human dignity operates. If one comes to the legal idealists, like Lasswell, one constantly finds the phrase, human dignity, used. But what actually are they after; what does it mean; what standard is there for it? How can one be dignified; how can any man be dignified if, in fact, he has only an animal nature? Why is not a dog dignified in the same sense? Presumably they appeal to rationalism, not to right reason, but to rationalism. Man is a rational creature; therefore, he is dignified. Of course, that doesn't really follow because there are plenty of shrewd, clever, quick people who nevertheless are lacking in human dignity. So it seems to me that here is one of the cardinal points of division in our time between the left in jurisprudence: the understanding of what human dignity amounts to, and what it is in law that courts and magistrates respect.

SCHUTZ: I would like to comment on this idea of left and right. Maybe I'm being pedantic, but knowing students I am afraid that if natural law is looked upon as being right wing, and in this case extreme right wing, it may capture some odd or negative allegiances. Natural law, it seems to me, is certainly a means of radical thought or radical criticism in our time. I hope I demonstrated that in my lecture. It can never be a means of radical politics, however. The natural law school cannot be revolutionary, for it has certain values concerning order and reason in contrast to disorder and violence. Thus gradualism is implicit in it. Dr. Strauss spoke to this point a moment ago: when the left is the orthodox position, natural law thinking may

paradoxically become a liberal way of thought. A little cartoon I saw recently illustrated this. Two students with YAF buttons were sitting on the stone steps of a campus building; one turned to the other and said: "Just think, someday we'll grow up and be stodgy old liberals."

STANLIS: I think that Professor Schutz has raised a very interesting question by implication, at least. That is, the whole connection between legal positivism and politics as such. I think there is a connection. I think that if we were to trace it out historically we would see some of the connections deriving from the rationalistic philosophy of the Enlightenment. But I think scientific positivism, positivism whether in law or in politics, cannot escape from the consequences of its own assumptions and methods. The theory inevitably leads, I think, to the conclusion that the government which holds power *de facto* is the source of law, and that law is nothing but the command of those who have power. Of course, Hobbes was the first philosopher in the English-speaking world to put forth that idea explicitly. But if the law of nature is eliminated, and if in effect law is conceived of simply as power directly applied through political machinery, then there is, ultimately, a complete severance between law and ethics, and I think in that case positivism denies that there is a moral law to which the power of the state is in any way subject. I think that when this happens there is only one basis for legal and political authority. That is power or might. And I think this moves swiftly in the direction of the totalitarianisms of our time. So I think that one of the strong points to note concerning legal positivism is that in its political manifestations it feeds directly into totalitarianism.

RUTKOWSKI: It struck me that we had an interesting paradox posed by Professor Donoso this morning. He first noted that natural law thinking was obviously connected to a notion of norm. This norm then served to underpin a constitution. A constitution, finally, was rooted in revolution, in a norm-setting period. This chain of reasoning would seem to interject something in the way of what Professor Schutz has said about radicalism and natural law. Professor Donoso, would you like to review for us that particular notion?

DONOSO: This is one of the points I wanted to bring up in the paper but did not; namely, the relation between jurisprudence and political philosophy, a relationship often called jurisprudential philosophy. Having a legal theory, do you thereby have a political theory? Or does adhering to a political theory imply a legal theory? In connection with Kelsen and his ultimate norm, based as it is on a revolutionary act, the implied political philosophy is said to be totalitarianism. The crucial issue here is what is meant by revolution. There are those who maintain that a revolution is valid, and by this they seem to mean "good," if it succeeds in taking power; be the result better or worse

than the previous conditions. If you say that the left wing of the schemata I drew would give you a sort of totalitarianism, you must remember that the left-wingers say that the right wing yields this type of political structure. Natural law theories become, according to many of these people, an excuse for the status quo, an excuse for maintaining exploitation and calling it natural. Exactly what is the connection between jurisprudence and political philosophy? I really can't answer that except to point out that each side calls the other the same thing: totalitarian. This should answer the initial question. Legal theories do imply political positions. And when one legal philosopher fails to realize this, his opponent is quick to remind him of it.

STRAUSS: It is perfectly true that the right and left distinction as other people or Mr. Donoso or myself use it is merely a colloquial convenience, and the political connotations are very complicated. One could as well say that Professor Donoso presented these various positions in an ascending order, and forget about right and left; then this difficulty would be disposed of easily. But one thing surprised me most in Mr. Donoso's paper. At the beginning, I was completely at a loss as to what he meant when he called Lasswell a legal idealist; but then I was reminded by what Mr. Kirk said, that one can in a pinch call him a legal idealist. I agree entirely with Mr. Kirk's final judgment that Lasswell's notion of human dignity has no solid basis. He opens one of his books with the unholy trinity of "safety, income, deference" as the only motivations of political men in general. How can he ever arrive at a notion of human dignity? To say nothing of the fact that what is good for the goose, called politician, is also naturally good for the gander, called scientist. Or is the scientist also motivated only by safety, income, deference? What will we have to think of Lasswell then? And if a professor can be guided by something more noble than safety, income, deference, it is perhaps possible for a politician also to be guided by something higher. But the more precise reason why I believe that Lasswell cannot arrive at a tenable conception of human dignity is this: You cannot speak of human dignity if you cannot speak of self-respect, and you cannot speak of self-respect if you do not admit the possibility of self-contempt. Now what possibility of self-contempt can exist on the basis of the absolute relativism of the urges which Lasswell is preaching all the time? Therefore, I would say that his idealism is only the respectable relic of a heritage which he enjoys; it does not belong to the theoretical position taken by him.

DONOSO: It is a relic in the sense that it is Yankee Protestantism become secularized.

STRAUSS: Yes, but the secularization is in fact the abolition of what has become secularized. As for the other point which was raised in the discussion: the necessarily revolutionary origin of the

basic norm; I do not know whether Kelsen ever said this explicitly, but this, of course, is not ultimately decisive. The fundamental alternative may be said to be the one between Hobbes and Aristotle. According to Hobbes, the state of nature is a state of anarchy out of which a revolutionary founding act creates order. Accordingly, as Hobbes says somewhere, the beginnings of no government can be justified in conscience — Burke himself repeats this somewhere. The alternative view would, I think, admit that in many cases this is so, but there is no necessity for that; that is the meaning, I think, of the statement at the beginning of Aristotle's *Politics*, that there is a way that the political community can come into being without any violence, without any crime, by nature, through the outgrowth of the family or the village, for instance. The denial of this *possibility* is, I believe, the decisive difference. In other words, one can be very skeptical as to the origins of governments, or organized political societies, in the majority of cases. But one must not go so far as to deny the intrinsic possibility of a just beginning of civil society. This, I believe, is the difference between Aristotle, say, and Machiavelli and all those who follow him.

PAUL: When you talk about questions like censorship, obscenity, pornography, abortion, artificial insemination, marriage, divorce, capital punishment, homosexuality, etc., you cannot talk about legal questions alone, and they certainly are not moral questions *per se*, because there happen to be laws on the books. Positive laws, not abstract laws or divine laws. Now, if you are going to talk about examination of these laws, which is what I am dealing with in my own specific category of sterilization, how do you examine these laws? Do you examine them as lawmakers, as theologians, as marriage counselors, or do you examine them as ordinary citizens, as parents, as sweethearts, or what? In other words, here is a case where you are not talking about the "is" and the "ought"; you are talking about *both*. In other words, the "is" is the law, but the "ought" — if you are talking about sterilization or abortion — the "ought" is the law, the societal law and the moral law. Now, you can't separate those two except analytically when you sit and gab. But the two, won't you agree, are inseparable?

DONOSO: Yes.

PAUL: The question is, how do you separate them? If you want to talk about what to *do* with the Michigan divorce law, or if you want to talk to someone who asks what we are going to *do* about the Michigan sterilization law, you are not talking about an "ought"; you are talking about a real, positive law and what ought to be done with it. You see, you are involved in both.

When you are dealing with concrete problems — particularly problems that deal with social morality, public morality — the mores, as well as the morals, of the society are part of it the "is." That is

to say, we are not talking about an "ought" abstractly. If you go over to the library and pick up the Michigan divorce law or the Michigan law of homicide, it won't look like much when you read it, but the "ought" is in that law, and the aspirations of Michigan, written into common law over the years, are part of that law insofar as homicide is concerned. So that actually we are talking about "ought" in a different sense from the "ought" that you were talking about in the natural law framework of your lecture. We are talking about "oughts"; that is, moral "oughts" — expectations that actually are part of positive law. Whether they are pure is another thing, but they are certainly part of it. And I think the difficulty is one you speak of: How do you take them out of the positive law to talk about them; how do you abstract them, particularly if you are talking about changing, repealing, improving, or extending the law?

SCHUTZ: I'd like to take a crack at Professor Donoso's calm. After he had gone through the entire paper and shown a wide spectrum of opinion, opinion that is basic and upsetting, I might add — especially in respect to the one I do know of, Lasswell — he came down to a final dichotomy: that the positions on the spectrum are essentially naturalism and supernaturalism. In the first place, I am not sure what he means by supernaturalism, but I would deny there is any necessity of labeling anyone there a supernaturalist. I would also deny that the positivists are the naturalists. I imagine that those were the ones Donoso was considering to be the naturalists, is that so?

DONOSO: To a degree.

SCHUTZ: Do you mean by nature, "natural science?" Or do you mean that man's nature is ever changing, constantly malleable; or that man can be made into anything because he's a lump of clay? Then, the positivists are the naturalists. But if you mean that man has a nature or an irreducible core of humanness, I do not see where the term has to be pre-empted by one side or the other. I myself deny that supernaturalism is necessary to any of the positions, though all of them rest upon certain metaphysical assumptions.

I find the last assertion in Donoso's lecture most disagreeable. He did not go into the political differences that result from the positions he delineated. However, I suppose you are aware of them. He said that somehow these people can agree upon something; namely fulfillment of man. In effect, he is repeating an old rhubarb of political science — let's have an agreement to disagree. Professor Strauss referred to this in his lecture. When there's an agreement to disagree, and everybody says there are ultimates we don't agree upon but we can agree on all secondary things, it means that the ultimates are not important to them. Other questions are more important, and they are in agreement on those, but that is something else. If the ultimates

are of basic importance, the agreement to disagree becomes some kind of wishy-washy liberalism. If these are the important questions of our time, and they do have important consequences for our behavior, it will be difficult to bypass them by some agreement to disagree. As to the fulfillment of man, it is said that they all can agree upon it. That sounds all right, but let's stop a minute. What is man? For if you apply this to each one, you're involved in the same thing all over again.

STRAUSS: I do not agree. But I have a similar difficulty as Mr. Schutz has. If a naturalist is a man who denies grace or is ignorant of grace, Aristotle was a naturalist. But in another sense it is false to call Aristotle simply a naturalist. To simplify matters, let me call Aristotle the highest representative of naturalism and Thomas Aquinas the highest representative of supernaturalism. Now, how could Aristotle and Aquinas live together as citizens of the same political community and have a very broad agreement with one another while still being in fundamental disagreement? I would say they could be fellow citizens. And why? Because there is the thing called "temporal felicity," regarding which the two men would entirely agree. They would disagree regarding the supernatural felicity, but this would not affect their working together for the temporal welfare of their community. Let us look at the present situation in this country. Catholics and non-Catholics live together as citizens on the basis not only of mere expediency, but of an agreement regarding principles which are the political and moral principles proper. I believe that was a justification for Professor Donoso's stopping at this point and saying that the ultimate disagreement regarding the supernatural cannot be settled, at least not by human beings; nevertheless, it is possible to have a solid basis of rational agreement between these two branches of human beings. Is this not so?

DONOSO: I didn't mean it in that sense; I purposely meant it to be used in a wide sense, so that each could read into the term what he wished. But, to be specific, it means that the end of man for supernaturalistic ethics is to be found in some sort of deity. This can refer to traditional theistic religions that are based upon the Bible or, if you wish, to some sort of modern or contemporary idealism with its cosmic mind. The distinction I introduced was primarily metaphysical, and secondarily, ethical and jurisprudential. Metaphysically speaking, naturalism refers to the position that all things are within a time-space continuum, so that the end of man has to do with the temporal. I recognize that within the naturalist position there are shades of differences. For example, there are those who are called gross materialists and tend to make man no different from a rock or a pig. Then, there are those who maintain there is something "unique" in man, albeit based on matter and having no foundation beyond space and time, as do the contemporary naturalists of the humanist movement.

My separation of the natural and the supernatural meant in no way to bring in grace; it meant in no way to exclude it either, or to put the Thomist or Catholic in one category, and the others in a different category. And when I said that I saw no grounds for bringing the supernaturalistic and naturalistic positions together, I meant that I am pessimistic in thinking that the Thomists, for example, who say that the basis of their philosophy can be shown by reason — I'm not saying that it can't — will ever convince the non-Thomists that this is so. Like it or not, we have with us metaphysical problems that deal with the nature of man. To make significant progress in human relations in the political, or jurispolitical, realm we must agree on ultimates concerning man. This we have been unable to do. We cannot threaten our neighbor's life: "Agree with me or else!" Should we then "agree to disagree" and leave the situation stand as such? If we do, does this mean that ultimates are unimportant? Whatever we do, we must recognize that ultimates are the most important issues confronting man. However, I believe we can make some progress in the jurispolitical area without degenerating — and I purposely use that word — into an attitude of "let's forget about ultimates; they're not important." Actually, we have been doing this. We have been living together even with our different answers to ultimate questions, because of our common concern for man's temporal felicity. Both the naturalist and the supernaturalist have one common interest — unless their words have been empty — namely, man's happiness. Both would agree that the world should be made a place in which man can fulfill himself. This is to make the world a better place in which to live. As each new issue arises, we must continue to try to solve the problem without permitting those who maintain man's temporal felicity to interfere with those who hold to man's need for eternal happiness, and vice versa.

STANLIS: I interpret that portion of Professor Donoso's paper which dealt with bridging the gap in terms of a kind of moral prudence, not so much in terms of metaphysical principles, about which men differ very strongly. But even granting that difference and recognizing it fully and putting a primacy on it, men can, I think, still get along in the realm of the practical, often with different motives, if they observe prudence and temperance by restraining their insistence at all points upon the truth as they see it. For example, it is perfectly conceivable that a supernaturalist and a naturalist, in the sense that Mr. Donoso uses the terms toward the end of his paper, might find some individual very seriously in need of the necessities of life. The motives of the supernaturalist might be the glory of God in helping such a person; the motives of the naturalist might simply be materialist. But they could both agree that the person in question needs economic assistance. They might also agree as to their means. They do not

have to insist at every point on their theological or metaphysical differences. And I think as a matter of moral prudence they can work in the practical realm toward agreed upon ends, even though there are many differences involved.